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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 503

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Appellant,

vs.

DIVISION OF TAX APPEALS, NEW JERSEY STATE DEPARTMENT OF TAXATION AND FINANCE AND THE STATE OF NEW JERSEY,

Appellees

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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STATEMENT OF APPELLEE, STATE OF NEW JERSEY, MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL THE JUDGMENT IN QUESTION, INCLUDING APPELLEE'S MOTION TO DISMISS THE APPEAL OR AFFIRM THE JUDGMENT.

The appellee, State of New Jersey, believing that the matters set forth below will demonstrate the lack of jurisdiction of the Supreme Court and the lack of substance in the questions raised by this appeal, files this, its statement in opposition to appellant's statement as to jurisdiction. Appellee includes herein its motion to dismiss the appeal

for lack of jurisdiction, or in the alternative to affirm the judgment of the Supreme Court of New Jersey on the ground that the questions raised by the appellant are so unsubstantial as not to need further argument.

The appellant seeks a review of a judgment of the Supreme Court of New Jersey on direct appeal from that Court. Appellee respectfully asserts that jurisdiction to hear such appeal is lacking under the statute and, furthermore, the grounds stated by the appellant appear on the face of the record to be so unsubstantial as to warrant the Court in summarily disposing of the appeal at this stage of the proceeding.

The matters relied upon by appellee are more particularly stated below:

1. Matters and Grounds Making Against Jurisdiction

The appellant seeks to invalidate a portion of its franchise excise tax assessment for the tax year 1946, levied pursuant to the "railroad tax law of 1941," (P.L. 1941, ch. 291; R.S. 54:29A-13 *et seq.*) The "franchise base" upon which the said taxes were levied was required by law to be computed upon a formula applied to "the next preceding year's net operating income", (P.L. 1941, ch. 291, sect. 14). The appellant complains because, in computing the "next preceding year's net operating income (1945), the state tax commissioner refused to allow: 1.) certain interest amounts never heretofore charged to operating income accounts but charged instead to non-operating income account, "interest on unfunded debt (Ex. S-11 and Ex. S-12); and 2.) a provisional payment of additional 1941 taxes and interest made in 1941 but ultimately determined not to be due.

Concerning the interest item. The record shows that in 1944 the Delaware, Lackawanna and Western Railroad Company requested advice from the Interstate Commerce Commission concerning the accounting of interest amounts

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heretofore invariably charged to non-operating income account "interest on unfunded debt" (Ex. S-13 Schedule A). The Interstate Commerce Commission immediately circularized the Association of American Railroads concerning a change in the accounting practice with respect to interest charges (Ex. S-13, Schedules B & C). Two months later the proposed change was disapproved (Ex. S-13, Schedules D & E). The Delaware, Lackawanna and Western Railroad Company was therefore advised that there would be no change in the regulations requiring such amounts generally to be charged to the said non-operating income account, but that since in New Jersey the interest was a part of the tax, the New Jersey railroads could charge such items to operating income accounts (Ex. S-13, Schedule F). In every state except New Jersey, amounts payable on account of default in payment of taxes, whether such amounts are called "additional assessments" for failure to pay taxes when due or interest or penalty, are chargeable to account 547 "interest on unfunded debt," which is below the operating income line and does not affect net operating income.

Concerning the item of additional 1941 taxes and interest. Immediately upon passage of the "railroad tax law of 1941", the City of Jersey City challenged the constitutionality of the new act. The appellant was not a party to that suit, which was vigorously defended by all of the other railroad companies operating in New Jersey together with the Attorney General. The old Supreme Court held the new Act to be valid prospectively but invalid as to 1941. *Jersey City* v. *State Board of Tax Appeals*, 133 N.J.L. 202, decided August 29, 1945. The Court based its conclusion as to 1941 on the fact that assessments for the year 1941 had already been made in the amount of $18,322,161.33 and that new assessments for that year which totalled only $15,042,931.07 resulted in an unconstitutional gift to the

railroads of an amount in excess of $3,000,000 (p. 208). Although appellant was not a party to the said suit and although no demand was made by the State, appellant obtained an *ex parte* order from the bankruptcy court providing for a provisional payment of $1,151,145, which the said appellant calculated the additional 1941 to be on the basis of the old Supreme Court's decision, and $532,422, which appellant calculated the interest to be on the basis of default since 1941 (Ex. 8 a & b). All of the other railroad companies paid the amounts they figured would be due although no demand was made by the State. None of the others paid any interest. It has never been determined that, under such circumstances, interest would have been due. All of the payments were placed in a trust fund to await the final outcome of the litigation. The payments were accepted in order to stop the possible running of any future interest charges (Witness Zink Ra 5a-10).

Upon appeal from the judgment of the old Supreme Court, the New Jersey Court of Errors and Appeals modified the judgment holding the "railroad tax law of 1941" to be constitutional in its entirety. *Jersey City* v. *Kelly*, 134 N.J.L. 239, decided on May 3rd, 1946. Thereafter the above mentioned sums of $1,141,145 and $532,422 were credited on the 1946 taxes of the appellant in conformity with the express provisions of the *ex parte* order of the bankruptcy court (Ex. 8 b).

The assessment of the 1946 franchise tax of the appellant was not arbitrarily or capriciously made but was made in conformity with the ruling of the Court of Errors and Appeals in *Norton, Trustee* v. *State Board of Tax Appeals*, 134 N.J.L. 57, 62 (January 31, 1946) which stated:

> "We hold that 'tax accruals' mean the current taxes for the particular year which have been assessed in conformity with law e.g. the amount certified by the tax assessor."

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Neither of the claimed items meets this test.

Nowhere in the record below can be found a forthright assertion that the railroad tax law of 1941 or any portion thereof is invalid. The appellant simply has sought to have a certain portion of its 1946 franchise excise tax assessment invalidated as not conforming to its own idea of what should constitute "the next preceding year's net operating income".

Rule 1:3-2 (c) of the New Jersey Supreme Court requires a statement of questions involved to be printed on a page by itself in an appellant's brief. The rule provides that such requirement is to be considered in the highest degree mandatory, admitting of no exceptions and that ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved. In compliance with this rule, the appellant included the following in its brief below:

"QUESTIONS INVOLVED"

I

"Does not the action of the State Tax Assessor in arbitrarily increasing the net railway operating income of an interstate railroad as reported to the Interstate Commerce Commission, with the effect of greatly increasing its State taxes, operate as a burden on interstate commerce in violation of the Commerce Clause and involve a denial of due process under the Fourteenth Amendment?

II

"Where a State statute bases a franchise tax on the 'Net Railway Operating Income' of an interstate railroad and in defining 'Net Railway Operating Income' the statute uses words and phrases which for a quarter of a century had been used and construed by the Interstate Commerce Commission in rulings and regulations issued by it pursuant to the Interstate Commerce

Act for the determination of 'Net Railway Operating Income,' should not such usage and construction be followed in construing the State statute?

III

"Where a State statute imposes on an interstate railroad a franchise tax based upon an apportionment to the State of a part of the entire 'Net Railway Operating Income' of the interstate railroad system, may the State Tax Assessor legally and constitutionally increase such 'Net Railway Operating Income' as defined by the State statute and as reported to and determined by the Interstate Commerce Commission pursuant to the provisions of the Interstate Commerce Act, so as to increase the amount of the State taxes?"

There is no mention in this statement of the 1941 Act being unconstitutional. The appellant does not even suggest that, if the judgment of the Appellate Division should be sustained, the Act would be in any wise unconstitutional. On the contrary, the appellant stated in its brief at page 22:

"The New Jersey franchise excise tax can only be justified as a tax on the New Jersey earnings of appellant. The only attempt of the statute to determine the earnings of appellant in the State is by taking the Net Railway Operating Income of the System, whether made in two or more States, and taking as a base for taxation by New Jersey that proportion thereof which the mileage of the railroad in New Jersey bears to the total mileage of the railroad. The Supreme Court has held that such a method of determining the earnings of a railroad system in a State is not unreasonable. *Pittsburgh, C.C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 430, 431, 38 L. Ed. 1031, 1038, 1040 (1894); *Atlantic Coast Line R. Co.* v. *Daughton*, 262 U. S. 413, 67 L. Ed. 1051, 43 S. Ct. 620 (1923); *Southern R. Co. v. Kentucky*, 274 U. S. 76; 71 L. Ed. 934 (1927); *Norfolk & W. R. Co. v. North Carolina*, 297 U. S. 682, 684, 80 L. Ed. 977, 980 (1936); *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (C. L. Stone) (1938).

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"We do not question the constitutionality of the New Jersey statute as it is written. When, however, the Director, Division of Taxation, so construes the statute as to permit him arbitrarily to increase the system Net Railway Operating Income of a railroad carrier to the end that the portion subject to taxation in this State is much greater than the 'franchise base' as specified in the statute, it necessarily follows that New Jersey is assessing a franchise tax not only on the earnings fairly attributable to New Jersey, but actually upon the earnings of the railroad in other states as well, for 66.3709% of all tracks of The Central Railroad Company of New Jersey System are in New Jersey (Ex. 2, Ap. 44a). In the case at bar the Net Railway Operating Income of the System for the year 1945 was $145,349, but was increased 1600% to an 'adjusted Net Railway Operating Income of the System' of $2,323.265 (Ex. 2, Ap. 45a), upon which an effective franchise excise tax for 1946 was calculated of $422,769 (Ex. 2, Ap. 46a), or an amount three times the amount of the Net Railway Operating Income of the System as reported to and determined by the Interstate Commerce Commission."

In addition to the above, the Supreme Court of New Jersey had before it the opinion of the Superior Court, Appellate Division, which makes no mention of any claim of unconstitutionality if the construction, followed ever since the authoritative opinion in *Norton, Trustee* v. *State Board, supra,* should be reaffirmed. The New Jersey Supreme Court had every reason to believe, as has this Court by the moving papers in the instant appeal, that the appellant is complaining because the State Tax Commissioner had improperly applied the statute and because the said Commissioner had, according to the appellant, arbitrarily and capriciously increased the 1946 assessment. (See assignment of errors.) The absence from the opinions in the Appellate division and the New Jersey Supreme Court of

any reference to the federal question of constitutionality of the statute itself was not an oversight. Such question was never argued. The sole question argued was the proper construction of the franchise provision of the act. When the New Jersey Supreme Court answered that question and reaffirmed the rule of *Norton, Trustee* v. *State Board, supra,* it had completed its assignment.

Since the appellant never brought in question the constitutionality of a state statute and had the question decided adversely to its contention, there is no matter properly before the Supreme Court on appeal. Also since the Supreme Court is bound by the construction placed by the New Jersey Supreme Court upon a state tax statute, the matter sought to be raised by the designation of errors presents frivolous and fictitious issues, which are not the subject of appeal or are of such unsubstantial nature as to warrant summary disposal upon this motion. Also even if the necessary constitutional question had been properly raised below, the issue would have been so unsubstantial as to warrant summary disposal because the "railroad tax law of 1941" is in substitution of a higher straight property tax which time after time had been held wholly constitutional. (History of litigation set out in *Wilentz* v. *Hendrickson*, 135 N. J. Eq. 244, 258 (E. & A. 1944).) To support these various contentions, the following is respectfully submitted:

A. There Are No Federal Questions

The Supreme Court is without jurisdiction of an appeal under 28 U.S.C.A. 1257 (2) unless there was "drawn in question" before the Supreme Court of New Jersey the validity of the state statute under review. In *Wilson* v. *Cook*, 327 U. S. 474, 480 (1946), the Court said that the purpose of this requirement is to make certain that no judgment of a state court will be reviewed on appeal

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by the Supreme Court unless the highest Court of the State has first been apprised that a state statute is being assailed as invalid on Federal grounds, citing *Charleston Fed. Sav. & L. Asso.* v. *Alderson*, 324 U. S. 182 (1945). The jurisdictional requirement is only satisfied if the record shows that the validity of the statute has been either presented for decision to the highest court of the State, *Wall* v. *Chesapeake & Ohio R. Co.*, 256 U. S. 125 (1920) or has been decided by that Court. *Whitfield* v. *Ohio*, 297 U. S. 431. (1936).

The record in the instant case does not disclose that appellant did at any time assert that the construction placed by the New Jersey Courts on the franchise provisions of the 1941 tax law caused such provision to violate the Constitution of the United States. On the contrary since the beginning of this litigation, the appellant has complained only of the "arbitrary and capricious" action of the state taxing authorities and has alleged that the said action or conduct violated the constitutional rights of the appellant.

Furthermore, even in the present assignment of errors, the appellant does not explicitly assert that, if the legislature intended to permit only the inclusion of current items for the purpose of calculating the next preceding year's net operating income, this would make the 1941 franchise tax provision unconstitutional. This in itself would make the appeal defective for, as it was held in *Charleston Fed. Sav. & L. Asso.* v. *Alderson, supra*, even where the Federal questions have been properly raised below an appeal may be dismissed where the appellant fails to attack a statute explicitly in its assignment of errors.

It is obvious from the course charted by the appellant below and from the moving papers in this case, that the appellant is attacking specific assessments and has no wish

that any portion of the 1941 tax law should be declared to be unconstitutional. In *Wilson* v. *Cook, supra* (p. 482), the Court restated the well established rule that, in order to support an appeal, it is necessary that the validity of the statute itself and not an assessment under the act be presented, citing many cases to support the rule.

In *Ferry* v. *County of King*, 141 U. S. 668 (Wash. 1891), it was held that the Supreme Court will not consider a case where a state law is admitted to be valid and the only question is whether it has been correctly construed. The quotation from the appellant's brief below (p. 22) shows clearly that the instant case is squarely within rule of the *Ferry* case.

The present appeal must fall not only because the validity of the statute was not properly drawn in question but, because the matters sought to be raised on this appeal are frivolous or fictitious. The moving papers disclose that appellant still urges that the New Jersey tax statute was improperly construed. The appellant seeks by this appeal to establish a construction more favorable to itself. But there is no jurisdiction in the Supreme Court to undertake such an inquiry for as was said in *Aero Mayflower Transit Co.* v. *Board of R.R. Com.*, 332 U. S. 495, 499 (1947):

> "We put aside at the start appellant's suggestion that the Supreme Court of Montana has misconstrued the state statutes and therefore that we should consider them, for purposes of our limited function, according to appellant's view of their literal import. The rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to state statutes by state courts."

Since the question of the constitutionality of the "railroad tax law of 1941" was never submitted to the New Jersey Courts but, on the contrary, the constitutionality of

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such law as written was repeatedly urged below and, since any other questions sought to be raised by the instant appeal are frivolous or fictitious, there is no jurisdiction in the Supreme Court to hear such appeal. *Treat* v. *Taylor*, 199 U. S. 274 (1905.)

But even if the appellant had explicitly drawn in question the validity of the statutes, the question would have been so unsubstantial as to require the Supreme Court to dispose of the matter summarily by dismissing the appeal or affirming the judgment, because

B. No Substantial Federal Question Is Raised

Prior to 1941, New Jersey levied a straight property tax. (P. L. 1888, ch. 208, as amended; R.S. 54:19-1 *et seq.*) The 1888 law had been the source of much litigation. The said law was repeatedly held to be constitutional. One complaint had been that earnings were not taken into consideration in determining valuations. The Circuit Court of Appeals commented upon this lack in *Lehigh Valley R. R. Co., et al.* v. *Martin*, 100 Fed. 2d 139 (C. C. A. 3rd 1938), (all the railroads). The New Jersey Legislature sought to remedy this lack by the "railroad tax law of 1941". As was said by the Court in *Norton, Trustee* v. *State Board, supra:*

> "The new system was devised to provide some measure of relief in poor earning years while providing for a greater return to the state in times of high earnings."

That the new railroad tax law was in substitution of the old law is shown by P. L. 1941, ch. 291, sec. 74 which after providing for abatement of taxes levied under the old law said:

> "This act shall be construed as a revision of chapters nineteen through twenty-nine inclusive of Title 54 of the Revised Statutes * * *."

Also by sec. 12 it is provided:

> "Taxes assessed pursuant to this act shall be in lieu of all other State or local taxation of or measured by property taxable hereunder, other than assessments for benefits."

The total tax levied under the new act is less than that levied under the old tax act. For the year 1941, the reduction for the appellant alone was $1,151,145. For the period 1941 to 1947 inclusive, the amount required to be paid by appellant under the 1941 act was substantially lower even on the basis of the present construction, than under the 1888 act (R. S. 54:19-1 *et seq.*). Although such period included the war years when the earnings were very high, the State for the whole period collected $6,921,000 less from appellant. (Local and average tax rate applied to valuations shown on Ex. S-14). For the years 1946 and 1947, the reductions of appellant amounted to approximately $1,793,300 and $2,605,500 respectively. Since the combined tax under the 1941 act was in substitution of and was less than the straight property tax would have been, this case comes squarely under the rule of *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688 (1894), wherein the Court said (p. 700):

> "We are of the opinion that it was within the power of the state to levy a charge upon this company in the form of a franchise tax, but arrived at with reference to the value of its property within the state and in lieu of all other taxes, and that the exercise of that power by this statute, as expounded by the highest judicial tribunal of the state in the language we have quoted, did not amount to a regulation of interstate commerce or put an unconstitutional restraint thereon."

As has been pointed out, appellant had admitted the constitutionality of the 1941 act as written. (Brief below

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at pg. 22.) It is difficult to comprehend how, if a franchise tax based upon the next preceding year's net operating income, is constitutional, it may reasonably be claimed that such tax could become unconstitutional because operating income charges are confined to those of the years under consideration and charges never heretofore placed in operating income accounts are excluded therefrom. We have found no case which supports a finding of unconstitutionality based upon so flimsy a premise. We respectfully submit that the constitutionality of State tax laws cannot be made to depend upon the acceptance by a State of the bookkeeping practices of a taxpayer.

The railroad tax law of 1941, as construed, has substantially benefitted the railroads generally in New Jersey. There is no general attack upon the constitutionality of that law. On the contrary in a concerted defense, the railroad companies were successful in sustaining the validity of the 1941 railroad tax law in its entirety, *Jersey City* v. *Kelly*, *supra*. Nothing shown in the moving papers on this appeal would even raise a suspicion that this Court would at this time interfere with the operation of that act as construed.

We have shown above the frivolous nature of the appeal as a reason for the Supreme Court not accepting jurisdiction. We beg leave to repeat that argument including the very appropriate observation of the Court in *Aero Mayflower Transit* v. *Board of R. R. Com.*, *supra*, to the effect that:

> "The rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given a state statute by state courts."

It would appear therefore that, even if the appellant had properly raised the invalidity of the 1941 railroad tax law below, the questions presented by the appeal would be of

such an unsubstantial nature as to warrant the Supreme Court summarily dismissing the appeal or affirming the judgment of the New Jersey Supreme Court. *Zucht* v. *King*, 260 U. S. 174 (1922).

2. Motion to Dismiss or Affirm

Appellee respectfully submits this statement showing there is no Federal question involved and consequently a lack of jurisdiction; and further that the questions upon which the decision of this case depends are so unsubstantial as not to need further argument.

Wherefore appellee respectfully moves the Court to dismiss this appeal, or in the alternative to affirm the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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